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In The
Supreme Court of the United States
October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

If plaintiff's motion for class certification is denied and thereafter plaintiff voluntarily settles all of his individual claims without retaining any personal stake or interest in the outcome of the controversy, does he have standing to appeal the order denying class certification under Article III, Section 2, Clause I of the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (hereinafter the "Second Circuit"), dated November 6, 1986, is unreported. (Pet., App. A.) The opinion of the United States District Court for the Southern District of New York (hereinafter "District Court") is reported at 109 F.R.D. 391 (S.D.N.Y. 1986). (Pet., App. B.)

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JURISDICTION

The judgment of the Second Circuit was entered on November 6, 1986. The petition for a writ of certiorari was filed on February 4, 1987. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

The issue sought to be reviewed involves the interpretation of Article III, Section 2, Clause 1 of the United States Constitution.

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under their authority—to all Cases affecting Ambassadors, other public Ministers and Consul;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; to Controversies between two or

more States;—between a State and citizens of another state;—between citizens of different States;—between citizens of same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

———o———

STATEMENT OF THE CASE

A. Nature of Plaintiffs' Complaint

The named plaintiffs commenced this action on behalf of themselves and a putative class consisting of past and present members of Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 363"). The overwhelming majority of the putative class were members of Local 363. None of the plaintiffs were members of Local 363 at the time this action was commenced. Two of the three named plaintiffs, Kamean and Williams, and some of the proposed class members belong to Local 3 of the International Brotherhood of Electrical Workers (hereinafter "Local 3"), which is a rival union of Local 363 and has a well documented and judicially acknowledged history of antagonism towards, and competition with Local 363. (Resp., App. A.) The third plaintiff, Coffie, resigned from Local 363 and is presently competing with the Corporate Respondents (hereinafter "Employers") as a self-employed electrical contractor.

This action sought recovery of alleged underpayments of wages and benefit contributions payable by the Employers pursuant to the provisions of a collective bargaining agreement between Local 363 and the Employers

on federal projects under the Davis-Bacon Act, 40 U.S.C. § 276(a) and state projects under the New York State Labor Law § 220.

In this action, plaintiffs alleged that Local 363 breached its duty of fair representation under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 *et seq.* and the Trustees of Local 363's employee benefit plans (hereinafter "Trustees") breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, by failing to collect the alleged underpayments, and that the Employers, Trustees and Local 363 "conspired" to deprive each member of the putative class of their lawful compensation.

Plaintiffs have not paid and are not obligated to pay for any costs, including legal fees of this action. The entire cost of this lawsuit, including all legal fees, has been and will be paid by an organization known as the Joint Industry Board of the Electrical Industry (hereinafter "Board") which, except for one public appointee, is composed entirely of representatives from Local 3 and its affiliated employers. There are no representatives from Local 363 or its affiliated employers on the Board. In addition to being dominated by representatives of Local 3 and its affiliated employers, the Board is exclusively funded by contractors signatory to Local 3's collective bargaining agreement.

B. District Court's Opinion

The District Court denied plaintiffs' motion for class certification primarily based upon its finding that both plaintiffs and their attorneys were not fair and adequate

representatives of the class as required by Fed. R. Civ. P. 23(a)(4), due to conflicts of interest that existed between: (1) plaintiffs and the majority of the putative class; and (2) plaintiffs' attorneys and the putative class. The District Court found that the loyalty of both Kamean and Williams to their present union, Local 3, "conflicts directly with the interests of those class members, a majority, who have retained their affiliation with Local 363." (Pet., App. B, p.10a.) The District Court further found that "unlike those class members who still depend upon Local 363 for their livelihood, the named plaintiffs have no stake whatsoever in the continued economic viability of Local 363 or in its ability to survive a protracted and costly lawsuit." (Pet., App. B, p.11a.) The District Court, therefore, held that because "plaintiffs possess a powerful incentive to dismember Local 563 and divide it from its affiliated contractors . . ." (Pet., App. B, p.11a) there was no assurance that they would fairly and adequately represent the claims of the members and absent class members who would have been bound thereafter by their actions. The District Court further found that plaintiffs' counsel, McDonough Marcus Cohn & Tretter, P.C. (hereinafter "McDonough-Marcus") was also not a fair and adequate representative of the putative class because the entire cost of this lawsuit, including their fees, was being paid by the Board. The District Court held that as holder of the "purse strings" the Board was capable of withdrawing financing at any time and that "such a threat, necessarily would compromise the independence of class counsel [McDonough-Marcus] or, at a minimum, influence counsel to consider serving the interests of Local 3." (Pet., App. B, p.12a.) Accordingly, the District Court opined that McDonough-Marcus' "critical alliances with and obligations to Local 3 . . . will be impermissible and

conflicting" and thus precluded them from representing the class. (Pet., App. B, p.14a.)

C. Plaintiffs' Settlement Of Their Individual Claims

After plaintiffs' motion for class certification was denied, but immediately before their individual claims were scheduled for trial, each of the plaintiffs voluntarily settled all of their claims against the defendants by executing a Stipulation of Dismissal with Prejudice and a General Release (hereinafter "Settlement Documents"). This settlement resulted in the plaintiffs' relinquishing all of their interests in this litigation in exchange for receiving all of the relief to which they were entitled. By settling their individual claims and having all of their attorneys' fees and expenses paid by the Board, plaintiffs explicitly and completely divested themselves of any personal stake or interest in the outcome of this litigation. However, despite executing the Settlement Documents and receiving all of the benefits of their respective settlements, plaintiffs appealed the denial of their motion for class certification to the Second Circuit.

D. Court of Appeals Decision

In a unanimous decision, the Second Circuit dismissed petitioners' appeal on the grounds that they lacked standing to press their appeal because they "no longer have a stake in the outcome of the case, and cannot benefit in any way from a reversal of the denial of class certification." (Pet., App. A, p.2a.) This decision reflected the Second Circuit's opinion that petitioners no longer had an interest in the outcome of this case because: (1) by voluntarily settling their individual claims they obtained all of the relief to which they were entitled and (2) all of their litigation costs were being borne by the

Board, rather than the plaintiffs themselves. Accordingly, the Second Circuit relying on this Court's decisions in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980) and *Powell v. McCormack*, 395 U.S. 486, 496 (1969), held that plaintiffs lacked "a legally cognizable interest in the outcome" and "no justiciable controversy" was presented to permit the appeal. (Pet., App. A, p.2a,)

SUMMARY OF ARGUMENT

The Second Circuit correctly applied this Court's decisions in *Roper* and *Powell*, to the facts of this case. Contrary to petitioners' assertions, by voluntarily settling all of their individual claims, receiving all of the relief to which they were entitled, and having all of their litigation costs paid by a third party, petitioners do not have a personal stake or legally cognizable interest in the outcome of this case to permit them to appeal the denial of their motion for class certification. Since petitioners have neither a continuing personal stake in the outcome of this action, nor are their claims capable of repetition yet evading review, the Second Circuit was correct in holding that Article III and the precedents of this Court required dismissal of petitioners' appeal. The Second Circuit's decision is therefore not in conflict with the Eleventh Circuit's decision in *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984). Accordingly, review by this Court of the Second Circuit's fact-determined decision is unwarranted and the writ of certiorari should not be granted.

ARGUMENT

The Court Of Appeals Correctly Applied this Court's Precedents

Article III of the Constitution limits federal court jurisdiction to "cases" and "controversies" that are presented by parties who have a personal stake or legally cognizable interest in the outcome of the controversy. *Powell,* 395 U.S. at 496. A party without the requisite personal stake in the litigation is without "standing" to prosecute the action and vitiates the jurisdiction of the federal court to adjudicate the controversy. *Roper,* 445 U.S. at 336; *Flast v. Cohen,* 392 U.S. 83, 101 (1968).

When a class action is commenced two distinct issues are presented for judicial resolution: (1) whether the action satisfies the requirements of Fed.R.Civ.P.23; and (2) whether the substantive allegations in the complaint are meritorious. The denial of class certification is a procedural ruling, which is collateral to the merits of the litigation. This Court has held that such collateral rulings—like other rulings—may be appealed only when the requirements of Article III are satisfied. *Roper,* 445 U.S. at 349.

In *United States Parole Commissions v. Geraghty,* 445 U.S. 339, 404n.10 (1980), this Court expressed no view whether Article III would permit named plaintiffs who settle their individual claims after denial of class certification to appeal from the adverse order. However, this Court has consistently held that the only party who has standing to appeal a decision of a federal court is an individual who retains a stake in the appeal sufficient to satisfy the constitutional requirements of Article III. *Roper,* 445 U.S. at 349. In the present case, the indisput-

able facts in the record clearly demonstrate that plaintiffs: (1) voluntarily settled all of their claims in this controversy; (2) executed Settlement Documents whereby they relinquished any interest in the outcome of this action; (3) received all of the relief to which they were entitled; (4) would not benefit by any prospective relief obtained by the putative class; (5) had all of their litigation costs, including attorneys' fees, paid by a third party, the Board; and (6) alleged claims that are not capable of repetition because they are no longer members of Local 363.

There is neither a split among the circuits nor any ambiguity surrounding this Court's precedents or the Constitution's requirements under Article III concerning the requisite standing an individual must possess to appeal from an order of a district court. Unless a party who settles his individual claims retains a "personal stake" in the outcome of the litigation, he does not have the requisite standing to press the appeal from an order which denies class certification. Due to petitioners' full and final voluntary settlement of all of their claims, and the resultant lack of interest in the outcome of this litigation, their petition does not reach the question reserved by this Court in *Geraghty*.

Although Article III justiciability is "a flexible doctrine of uncertain contours," (*Poe v. Ullman*, 367 U.S. 497, 508 (1961); *Flast v. Cohen*, 392 U.S. at 97), the Constitution imposes a minimum requirement on a plaintiff that in order to satisfy Article III he must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants throughout the entirety of the litigation. *See Gladstone*

Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459n.10 (1974)). This Court's rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal courts have consistently adhered without exception." *Geraghty,* 445 U.S. at 412; Davis, *Standing: Taxpayers and Others,* 35 U. Chi. L. Rev. 601, 617 (1968).

Although Article III contains no exceptions for class actions, this Court has held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). Only after a class has been certified in accordance with Fed.R. Civ.P.23, can it acquire a legal status separate from the interest asserted by the named plaintiff. *Sosna v. Iowa,* 419 U.S. 393, 399 (1975). Given a properly certified class, the live interest of the unnamed but identifiable class members may supply the personal stake required by Article III when the named plaintiff's individual claim becomes moot. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 755-756 (1976).

However, in this case, no class has been certified, the three putative class representatives have fully settled their claims and therefore no longer have the slightest interest in the outcome of this action. The case therefore lacks a plaintiff with the personal stake in the outcome which is a constitutional prerequisite to confer jurisdiction under Article III. The only parties who appear to have

an interest in this case are: the Board which is financing this suit; McDonough-Marcus which continues to be paid by the Board; and Local 3 which is attempting to dismember Local 363 as an organized bargaining agent. These parties should not be able to utilize this litigation or this petition as a vehicle to pursue their own self interests.

———o———

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Murphy, P.J., Sullivan, Ross, Asch, Silverman, JJ.

19418 In re Application of Action Electrical Contractors Co., Inc.,
Petitioner, I.B.Lampert

For a Judgment, etc.,
Harrison J. Goldin, etc.,
Respondent, R.Maldonado

That Petitioner, etc.,
New York Housing
Authority, et al.,
Respondents, R.G.Garfinkle

To rescind, etc.,
- and -
Lipco Electrical Corporation,
Respondent.

Determination of the Comptroller, dated October 17, 1983, which, *inter alia,* found that petitioner had wilfully violated Labor Law § 220 subd. 3 on two occasions, confirmed, without costs.

In Labor Law § 220 subd. 3, the Legislature has required that supplements be paid to workmen. Undoubtedly, the Legislature realized that, if cash payments were given to workmen in lieu of supplements, the cash payments could be quickly dissipated. The workmen would thus be left without any protection against future contingencies which might threaten their health or welfare.

In light of the Legislature's policy embodied in Labor Law § 220 subd. 3, it would be improper for this Court to develop a rule of "substantial compliance" or "substituted compliance." Our vote of confirmance is supported by the

only two cases that have directly explored this subject matter (*Matter of Skyway Roofing of Troy, Inc. v. County of Rensselaer,* 79 A D 2d 1078, *lv. to app. den.* 53 N Y 2d 606; *Pilot Mechanical Corp v. Carrol,* 94 Misc 2d 437).

The record contains substantial evidence to support the administrative determination that Action committed violations in failing (i) to provide supplemental benefits and (ii) to maintain records. The other issues raised in Action's brief are merely mentioned in its petition. There was no proof submitted in the record to show that any of those other issues had merit or warranted development at a trial or hearing.

For the reasons stated, we would confirm:

> All concur except Ross and Silverman, JJ who dissent in part in a memorandum by Silverman, J. as follows:

This is an Article 78 proceeding by petitioner Action Electrical Contractors Co., Inc. ("Action") (a) to annul the determination of respondent The Comptroller of the City of New York ("Comptroller") that Action had wilfully violated Labor Law § 220 twice by failing to provide prevailing supplemental benefits to Laborers and electricians, and that Action had failed to maintain records on contracts as required by Labor Law § 220 (3-a); and (b) to direct respondent New York City Housing Authority ("NYCHA") and its Chairman to award Action as the lowest responsible bidder a contract with respect to certain electrical installation at Redfern Houses, Queens.

We would grant the petition to the extent of annulling the determination of the Comptroller, but would dismiss the petition as against the Housing Authority.

The effect of the Comptroller's determination that Action had twice wilfully failed to provide supplements was to render Action ineligible to submit a bid on or be awarded any public work contract with the State, any municipal corporation, or public body ("public agency") for a period of five years (Labor Law § 220-b [3] [b]).

Labor Law § 220 (3) requires contractors with any public agency to pay laborers, workmen or mechanics upon such public works not less than the prevailing rate of wages, and to provide such employees "supplements" in accordance with the prevailing practices in the locality. Supplements are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." Labor Law § 220 (5) (b).

The Comptroller of the City of New York as "the fiscal officer" responsible (Labor Law § 220 [5] [e]) has determined that while Action paid the prevailing wages, it failed to provide prevailing supplements.

Action is a member of the United Construction Contractors Association, which has a collective bargaining agreement with Local 363 of the Teamsters Union. Apparently most of the major electrical contractors in New York City belong to associations which have collective bargaining agreements with Local 3 of the International Brotherhood of Electrical Workers.

This case must be considered in the context and against the background of the continuing dispute between

Local 3 and Local 363 wherein it has been charged and found by some courts that Local 3 is engaged in an effort "to expropriate for itself, electrical work being performed by the Teamsters [Local 363] thus giving Local 3 a monopoly over such work." *National Labor Relations Board v. Local 3, International Brotherhood of Electrical Workers, AFL-CIO,* 542 F2d 860, 865; *see also Allen Bradley Co. v. Local Union #3 International Brotherhood of Electrical Workers,* 325 U.S. 797.

The present prevailing wage and supplement proceeding was precipitated by a complaint forwarded to the Comptroller by a member of Local 3's Joint Industry Board.

The Comptroller, as we have said, found that Action was paying the prevailing rate of wages but it was not providing the prevailing supplements. These supplements are a package of welfare benefits. Each of the two collective bargaining agreements contains a provision for such package. Not unnaturally the packages for welfare benefits in the two collective bargaining agreements are not the same. Because Local 3 apparently represents the large majority of the electricians involved, the Comptroller has taken the provisions of that agreement as the prevailing wages and supplements which must be provided by all contractors doing public work in the city.

The Comptroller's "Schedule of Prevailing Rates of Wages and Supplemental Benefits" lists the supplements by initials, which apparently correspond to the various welfare benefits and funds provided for in the Local 3 contract, giving a dollar cost per day for each. The Comptroller has found the benefits provided for by the Local

363 contract not to be comparable or equivalent to those provided for by the Local 3 contract. Further the Comptroller has found there are some funds or benefits, *e.g.*, the "Additional Security Benefit Fund" provided for in the Local 3 contract, which do not appear among the Local 363 benefits, at least under that name.

As a practical matter, it is impossible in this industry for any moderate sized firm to comply with the requirements of supplemental welfare benefits except through union welfare funds. As Action's association is signed up with Local 363, to whose welfare fund Action contributes, Action and its employees must look to the welfare fund and benefits set up by the Local 363 bargaining agreement. They cannot look to the Local 3 bargaining agreement, for those provisions will not benefit Action's employees.

It appears that the amounts contributed by Action to Local 363 for supplemental benefits are less than those required under the Comptroller's schedule and the Local 3 agreement. In an effort to meet the standards, Action did the best it could: It added up the cost of supplemental benefits as set forth in the Comptroller's schedule, compared that with the amounts it was paying to Local 363 for supplemental benefits, and paid the excess in cash to its employees. (In the case of the occasional "laborers" employed, where there was no applicable collective bargaining agreement, Action paid to those laborers in cash the full amount of the benefit as required by the Comptroller's schedule). It is thus clear that Action was not trying to obtain any advantage for itself by paying less than the Comptrolier's standard for supplemental benefits; it was not cutting its costs to give itself an unfair

bidding advantage over Local 3 contractors; it was giving the full benefits of the supplements—so far as translatable into cash—to its employees. Indeed, the Comptroller found that the damage suffered by the employees, *i.e.*, the value of the benefits they ought to have received but did not, was offset by the additional cash paid by Action to its employees, so that the employees suffered no monetary damage.

However, the Comptroller holds that payments in cash cannot substitute for provision of supplemental benefits. He bases this on the fact that supplements are defined in the statute as remuneration "paid in any medium other than cash," Labor Law § 220 (5) (b). We do not think it necessarily follows that a cash substitute paid by an employer, where the welfare benefit is not available, constitutes a wilful violation. We note that the statute requires the Comptroller to determine "the *amount* of such supplement" (Labor Law § 220 [5] [c]), which suggests that such supplements are translatable into a cash equivalent, and the Comptroller's schedule, as we have said, does state a cash amount with respect to each supplemental benefit.

Further, it appears not to be contradicted that the State Industrial Commissioner (now the State Commissioner of Labor), who is the fiscal officer administering the same statute outside New York City as the Comptroller does within New York City (Labor Law § 220 [5] [e]), holds that supplemental benefits may be paid in cash, cash and benefits, or just benefits, so long as the total cost equals the benefits required by the prevailing practice.

The comptroller by finding two wilful violations (two contracts) has excluded Action—and as a practical matter

has excluded all contractors who do not have a collective bargaining agreement with Local 3—from doing electrical work for the City and public agencies within the City. On its face. this appears to us to be so undesirable a result, not clearly required by statute, as to be arbitrary and capricious. At a minimum, as it clearly appears that Action is doing its best to comply in the situation in which it finds itself, Action's violations are not wilful.

The Comptroller has also held that Action has failed to maintain records on each contract as required by Labor Law § 220 (3-a). This finding is not supported by substantial evidence. The Comptroller's witness conceded that Action's records accurately reflected the payments made by Action to Local 363 and its employees, and it was on this basis indeed that the Comptroller found Action did pay the prevailing rate of wages. The finding of a failure to maintain records is apparently based solely on a failure to produce booklets detailing the supplemental benefits of Local 363. That is not what the statute requires.

Accordingly, we would annul the Comptroller's findings that Action wilfully violated Section 220 of the New York State Labor Law twice; that it failed to maintain records on each contract; and that Action should pay a penalty of $1,500 to the City of New York.

The claim against New York City Housing Authority

With respect to the claim against the New York City Housing Authority the situation is somewhat different. The NYCHA does not make its own determinations as to

whether the contractors have complied with the prevailing wage and supplemental practices. That is done by the appropriate fiscal officer, the Comptroller of the City of New York. Having been informed by the Comptroller that a particular contractor has twice wilfully violated the statute, NYCHA was not acting arbitrarily or capriciously in declining to consider such contractor for work to be done for NYCHA; it was merely obeying the dictates of LABOR LAW § 220-b (3) (b).

Accordingly, we agree that the petition should be dismissed against the New York City Housing Authority.

Order filed.